

**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

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HEUNG WAH WONG,	:	
	:	Civil Action No. 05-5430 (DRD)
Petitioner,	:	
	:	
v.	:	<b>O P I N I O N</b>
	:	
ALBERTO R. GONZALEZ, et al.,	:	
	:	
Respondents.	:	
_____	:	

**APPEARANCES:**

HEUNG WAH WONG, Petitioner, Pro Se  
A#35-709-124  
Monmouth County Jail  
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Attorneys for Respondents

**DEBEVOISE, District Judge**

Petitioner, Heung Wah Wong ("Wong"), filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241, on or about November 16, 2005, in which he challenges his continued detention as unlawful and unconstitutional. At the time that he filed his petition, Wong was being detained by the Department of Homeland Security ("DHS"), Bureau of Immigration and Customs Enforcement

("BICE")<sup>1</sup> at an immigration detention facility in Paterson, New Jersey, pending his removal from the United States. He has since been transferred to the Monmouth County Jail in Freehold, New Jersey. Wong is still in DHS/BICE custody at this time.

The named respondents are Alberto R. Gonzalez, Attorney General of the United States; Michael Chertoff, DHS Secretary; John Carbone, Field Office Director of Detention and Removal; and Charles Myers, Warden of Passaic County Jail. The Government wrote to the Court, by letter dated February 17, 2006, stating that Wong's removal is imminent since the stay of deportation entered by the United States Court of Appeals for the Fifth Circuit has recently been lifted. For the reasons set forth below, the Court will deny the petition without prejudice.<sup>2</sup>

#### **BACKGROUND**

Wong is a native of Hong Kong, China, and a citizen of the United Kingdom. He entered the United States as a lawful permanent resident in 1976 with his mother and five sisters. On

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<sup>1</sup> Effective March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist as an agency of the Department of Justice, and its functions were transferred to the Department of Homeland Security ("DHS"). See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). The Bureau of Immigration and Customs Enforcement ("BICE") of the DHS is responsible for the interior investigation and enforcement functions that formerly were performed by the INS.

<sup>2</sup> Wong also filed an application for appointment of counsel in this matter. Because the petition for habeas relief will be denied, the motion for appointment of counsel is denied as moot.

August 11, 1997, an Immigration Judge ordered Wong's removal to China,<sup>3</sup> and Wong was removed from the United States on October 8, 1997 after he waived an appeal from the removal order. Sometime thereafter, Wong re-entered the United States. The BICE encountered Wong on July 1, 2002 and the earlier order of removal was re-instated. On July 18, 2002, Wong was convicted of aggravated illegal reentry.

In April 2003, Wong filed a habeas application challenging his 2002 conviction for illegal reentry and the 1997 removal order. The action was transferred to the United States District Court for the Southern District of New York. On or about June 3, 2005, the 2002 conviction for illegal reentry was vacated by the district court and the Government entered a "Nulle Prosequi". On August 30, 2005, the district court issued a stay of deportation and transferred Wong's habeas petition to the United States Court of Appeals for the Fifth Circuit, pursuant to the REAL ID Act of 2005.<sup>4</sup> The Fifth Circuit adopted the stay of removal pending further order from the court. The petition for review of the removal order remained pending in the Fifth Circuit when Wong

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<sup>3</sup> It appears that Wong's removal proceedings were based on his convictions for aggravated felonies. In particular, a 1992 conviction for attempted robbery and attempted criminal possession of a weapon in the second degree.

<sup>4</sup> The action was transferred to the Fifth Circuit because the underlying deportation order was issued from the Fifth Circuit.

filed this habeas action. In fact, Wong filed an appellant's brief in the Fifth Circuit on or about January 30, 2006. On February 17, 2006, the respondents wrote the Court and advised that Wong's petition for review pending in the Fifth Circuit was dismissed recently, and the stay of removal was lifted. Accordingly, Wong's deportation is now imminent. (Docket Entry No. 14).

Wong filed this habeas petition on or about November 16, 2005 seeking his release from detention pending removal. Wong argues that his continued detention is unlawful and unconstitutional under Zadvydas v. Davis, 533 U.S. 678 (2001) because he has been detained for more than 40 months based on a defective and illegal deportation. He contends there are no legitimate grounds for his continued detention pending removal, in that he poses no flight risk and presents no danger to the community.

Wong has asked the BICE to release him from custody. In a "file custody review" dated October 12, 2005, Wong was informed that he was not approved for release because his "removal from the United States appears imminent. ICE has been advised by the Consulate General of the United Kingdom that a travel document is available upon receipt of a flight itinerary." (Petition at Exhibit H). Further, BICE informed Wong that he is in custody because the Government is currently precluded from enforcing

petitioner's removal based on the stay of removal issued by the court on Wong's habeas petition. (Id.).

### **ANALYSIS**

#### **A. Standard of Review**

Wong seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241(c)(3). That section states that the writ will not be extended to a prisoner unless "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Here, petitioner challenges his continued detention for over 40 months. As stated above, Wong claims that his continued detention is constitutionally impermissible and unlawful because he has been held for more than six months and his removal is not foreseeable. See Zadvydas, 533 U.S. 678.

A pro se pleading is held to less stringent standards than more formal pleadings drafted by lawyers. See Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519, 520 (1972). A pro se habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. See Royce v. Hahn, 151 F.3d 116, 118 (3d Cir. 1998); Lewis v. Attorney General, 878 F.2d 714, 721-22 (3d Cir. 1989); United States v. Brierley, 414 F.2d 552, 555 (3d Cir. 1969), cert. denied, 399 U.S. 912 (1970).

Respondents contend that the recent lifting of the stay of removal, and the fact that Wong's deportation is imminent, renders this habeas petition moot.

For the reasons stated below, the Court finds that Wong's continued custody does not violate federal statutory or constitutional law at this time.

**B. Wong's Detention Complies with Federal Law**

Post-removal-order detention is governed by 8 U.S.C. § 1231(a). Section 1231(a)(1) requires the Attorney General to attempt to effectuate removal within a 90-day "removal period."

The removal period begins on the latest of the following:

- (i) The date the order of removal becomes administratively final.
- (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
- (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B).

Section 1231(a)(6) permits continued detention if removal is not effected within 90 days. However, the Supreme Court has held that such post-removal-order detention is subject to a temporal reasonableness standard. Specifically, once a presumptively-reasonable six-month period of post-removal-order detention has passed, a resident alien must be released if he can establish that his removal is not reasonably foreseeable. See Zadvydas v.

Davis, 533 U.S. 678 (2001); Clark v. Martinez, 543 U.S. 371 (2005).

In addition § 1231(a)(1)(C) provides that the removal period shall be extended, and the alien may remain in detention during such extended period, if the alien "acts to prevent the alien's removal subject to an order of removal."

Here, petitioner argues that he should not be subject to incarceration simply because he secured a stay of removal, especially where his detention has exceeded 40 months. However, it has been held that the six-month presumptively reasonable post-order removal period of Zadvydas is tolled when an alien requests judicial review of a removal order. See Soberanes v. Comfort, 388 F.3d 1305, 1311 (10<sup>th</sup> Cir. 2004) (detention "directly associated with a judicial review process that has a definite and evidently impending termination point" is "more akin to detention during the administrative review process, which was upheld [by the Supreme Court]") (citing Demore v. Kim, 538 U.S. 510, 527-29 (2003)); Wang v. Ashcroft, 320 F.3d 130, 145-47 (2d Cir. 2003) ("where a court issues a stay pending its review of an administrative removal order," the post-order detention provisions of § 1231 do not apply because "the removal period commences on 'the date of the court's final order'"); Akinwale v. Ashcroft, 287 F.3d 1050, 1052 n.4 (11<sup>th</sup> Cir. 2002) (by applying for stay, petitioner interrupted the running of the time under

Zadvydas); Evangelista v. Ashcroft, 204 F. Supp.2d 405, 409 (E.D.N.Y. 2002) (petitioner's reliance on Zadvydas to be released from detention is "disingenuous" when sole reason being held is his requested stay of deportation); Hines-Roberts v. Ashcroft, 2003 WL 21305471 at \*3 (D. Conn. Jun. 5, 2003) (unpubl.) (as a result of stay of deportation, Attorney General could not seek to bring about petitioner's deportation, and therefore, period of detention does not raise due process issue presented in Zadvydas); Archibald v. INS, 2002 WL 1434391 at \*8 (E.D. Pa. July 1, 2002) (unpubl.) (because petitioner asked for and was granted stay of deportation, he is not being held in violation of Zadvydas, but rather held pursuant to stay he requested).

Here, a stay of the removal was granted in the Second Circuit on or about August 30, 2005. The matter was transferred to the Fifth Circuit, which continued the stay of removal pending its review of the case. As the stay was still in effect when Wong filed his habeas petition, and until only recently, the presumptively-reasonable six-month period technically had not yet begun to run pursuant to 8 U.S.C. § 1231(a)(1)(B)(ii). Moreover, now that the petition for review has been dismissed and the stay of removal lifted by the Fifth Circuit, Wong's order of removal has become final and the 90-day removal period has only recently commenced. There is no indication in the record that Wong's removal to the United Kingdom is not reasonably foreseeable.



Travel documents have been requested and there is nothing to indicate that such travel documents will not be issued now that the stay of removal is lifted. Indeed, on October 17, 2005, the decision to continue detention was issued partly on this ground that a travel document is available upon request to the United Kingdom Consulate General upon receipt of a flight itinerary. (Petition, Ex. H). Accordingly, it would appear that Wong's post-removal-order detention is statutorily compliant.

Nevertheless, as argued by Wong in his habeas petition here, under certain circumstances, the sheer length of an alien's prolonged detention may violate his right to due process under the Fifth Amendment.<sup>5</sup> In Oyedeji v. Ashcroft, 332 F. Supp.2d 747, 753 (M.D. Pa. 2004), the district court noted that the "price for securing a stay of removal should not be continuing

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<sup>5</sup> In this regard, the Court notes the parallel to Zadvydas, which recognized the constitutional implications of prolonged detention for those aliens subject to a final order of removal. Realistically, the prolonged confinement of those detainees whose potentially meritorious challenge to removal is part of a congested court docket is indistinguishable from the indefinite detention of those aliens whose native countries refuse repatriation. Furthermore, this concern for an unjustified continuing detention for those aliens pending administrative removal proceedings was discussed by Justice Kennedy in his concurring opinion in DeMore v. Kim, 538 U.S. 510, 523 (2003). The Supreme Court stressed that mandatory detention of aliens pending their administrative removal proceedings was justified only "for the brief period necessary for their removal proceedings." 538 U.S. at 513. However, Justice Kennedy recognized that lawful permanent resident aliens "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." Id. at 523.

incarceration." Thus, under the Due Process Clause of the Fifth Amendment, Wong, a deportable alien, should be afforded an opportunity to be heard on the question of conditional release pending judicial review of a final administrative order of removal, the execution of which has been stayed by judicial order. See Oyedeji, 332 F. Supp.2d at 753-754; Harrison v. Hogan, 2005 WL 2020711 (M.D. Pa. July 18, 2005); Haynes v. Department of Homeland Security, 2005 WL 1606321 (M.D. Pa. July 8, 2005).

The Supreme Court recognized that "[f]reedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that [the Fifth Amendment's Due Process] Clause protects." Zadvydas, 533 U.S. at 690; Tineo v. Ashcroft, 350 F.3d 382, 398 (3d Cir. 2003). Indeed, the Third Circuit has held that

[w]hen detention [of an alien] is prolonged, special care must be exercised so that the confinement does not continue beyond the time when the original justifications for custody are no longer tenable. The fact that some aliens posed a risk of flight in the past does not mean they will forever fall into that category. Similarly, presenting danger to the community at one point by committing crime does not place them forever beyond redemption.

Ngo v. INS, 192 F.3d 390, 398 (3d Cir. 1994). The fact that a stay of removal has been issued should not change this result. See Ly v. Hansen, 351 F.3d 263, 272 (6<sup>th</sup> Cir. 2003) (an alien not normally subject to indefinite detention as in Zadvydas should not be detained simply because he seeks avenues of relief legally

available to him; while the alien may be responsible for seeking a stay of removal, he is not responsible for the length of time such determinations may take); Oyedeji, 332 F. Supp.2d at 753 (the price for securing a stay of removal should not be indefinite detention).

In this case, it appears that Wong was afforded due process because he received a custody review of his continuing detention pending removal pursuant to 8 C.F.R. § 241.4(i).<sup>6</sup> These rules essentially echo the principles set forth in Ngo, which then

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<sup>6</sup> The rules evaluated by the Third Circuit in Ngo are no longer in force, but 7 elements listed in NGO offer guiding principles by which to measure the current review procedures now in effect at 8 C.F.R. § 241.4. For instance, under 8 C.F.R. § 241.4(i), the Director of the Headquarters Post-Order Detention Unit ("HQPDU") is required to designate a two-person panel to make recommendations on whether an alien should be released or detained. This recommendation must be unanimous. The review panel examines the alien's records. If the panel does not recommend release, or if the HQPDU Director rejects a recommendation for release, the alien shall be personally interviewed by the review panel. The alien may have a representative at this interview, subject to reasonable security concerns, and he may submit any information he believes may be pertinent in securing his release.

Under 8 C.F.R. § 241.4(d), an alien may obtain a conditional release from detention by showing that his release will not pose a significant risk of flight and danger to the community, to the safety of others or to property pending removal. Under 8 C.F.R. § 241.4(e), an alien is eligible for release if the review panel or the HQPDU Director find that the following criteria are met: (1) travel documents are not available or immediate removal is otherwise not practicable or not in the public interest; (2) the alien is presently a non-violent person; (3) the alien is likely to remain non-violent if released; (4) the alien is not likely to pose a threat to the community if released; (5) the alien is not likely to violate the conditions of release; and (6) the alien does not pose a significant flight risk if released.

provided for the following due process safeguards: (1) advance written notice to alien of an opportunity to present information supporting release; (2) the alien has a right to representation at the review; (3) the alien has a right to an annual personal interview; (4) written explanations for a custody decision must be provided; (5) an opportunity for administrative review must be given; (6) custody reviews should occur every six months; and (7) a refusal to presume continued detention based on criminal history. Ngo, 192 F.3d at 399. The Third Circuit held that these provisions, if conscientiously applied, gave reasonable assurance of fair consideration of a petitioner's application for conditional release pending removal. Id.

Here, Wong admits that he has received a custody review as recently as October 2005. This custody review resulted in a decision to continue custody because Wong's past criminal history of serious and violent crimes suggests that he poses a threat to the community. Moreover, the decision to continue custody was based on Wong's removal being imminent since the Consulate General of the United Kingdom advised the BICE that a travel document for Wong is available upon their receipt of a flight itinerary. Further, custody was continued due to the judicial stay of removal. (Petition, Ex. H).

The Court does note, however, that the custody review may have been perfunctory. There is no indication whether this

custody review included an examination of Wong's file by the BICE reviewing officials, and a personal interview with the review panel since his release from detention was not initially approved. The decision merely states that Wong is not being released pending his removal because his removal is imminent and because he presents a flight risk. The decision acknowledges that a stay of removal was issued precluding the BICE from enforcing deportation at this time.

Nevertheless, this Court has carefully reviewed the petition and relevant documents provided, and giving due consideration to petitioner's arguments, finds that, at this time, Wong has received the process to which he was due with respect to his continuing detention pending removal. Wong received a recent custody review in October 2005. Even if the review was somewhat perfunctory, there is no dispute that Wong's removal to the United Kingdom is imminent now that the stay is lifted since the consular officials have assured that travel documents will be available upon receipt of a flight itinerary. The Court is not inclined to find the BICE decision to continue custody to be anything other than a meaningful individualized determination of Wong's status pending adjudication of the validity of his removal order, given the fact that Wong's removal is plainly imminent. Accordingly, the Court concludes that Wong's detention is not constitutionally impermissible at this juncture. The petition

will be denied without prejudice to Wong reasserting his claims regarding continued detention if the BICE does not remove Wong within the prescribed time now that the stay has been lifted and to provide adequate due process in that event.

**CONCLUSION**

For the reasons set forth above, this petition will be denied, without prejudice to Wong bringing a new petition if the Government fails to remove him in the reasonably foreseeable future now that the stay of removal. Wong's application for appointment of counsel (Docket Entry No. 2) is denied as moot. An appropriate order follows.

**/s/ Dickinson R. Debevoise**  
DICKINSON R. DEBEVOISE  
United States District Judge

Dated: April 11, 2006